BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES T. JOHNSON Claimant	)	
VS.	)	
U.S.D. 492 Respondent	)	Docket No. 1,011,441
AND	)	
KS ASSOC. OF SCHOOL BOARDS **WORKERS COMPENSATION FUND** Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the September 9, 2004 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on March 1, 2005.

APPEARANCES

Todd King, of Wichita, Kansas, appeared for the claimant. Anton Andersen, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument the parties stipulated that if the Board found claimant's claim compensable, then he sustained a 7 percent permanent partial impairment to his right leg.

ISSUES

Both parties concede claimant sustained an accidental injury to his knee while serving as a referee for a middle school junior varsity basketball game on December 3, 2002. However, claimant's status and average weekly wage at the time of the accidental injury are in dispute.

The ALJ concluded claimant's injury arose out of and in the course of his employment with respondent. In doing so, the ALJ explained that "[i]t is common knowledge that a school teacher and a coach wear many hats in the performance of their duty. Not all duties that a school teacher and a coach have can be specifically itemized."[1] The ALJ went on to conclude that claimant's average weekly wage under his contract with the respondent was sufficient to qualify him for the maximum weekly benefit of $432 per week and benefits were awarded accordingly.

The respondent asserts the ALJ erred in his determination that claimant sustained a personal injury by accident in the course and scope of his employment. Respondent maintains claimant was serving as a volunteer rather than as an employee at the time of his injury. Even assuming claimant was acting as an employee at the time, respondent contends the ALJ erroneously concluded claimant's average weekly wage includes those wages he earned as a teacher. Respondent believes claimant's average weekly wage is, at most, $15 per game.

Respondent also objects to the admittance of the transcript of the preliminary hearing testimony and the exhibits as part of the record and requests that the Board exclude those items from consideration in this matter.

Claimant urges the Board to affirm the ALJ's Award in its entirety.

The issues for the Board to address are as follows:

1. Whether claimant's accidental injury arose out of and in the course of his employment;

2. Claimant's average weekly wage; and

3. The propriety of considering the transcript of the preliminary hearing testimony and the exhibits attached thereto in deciding the underlying issues referenced above.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

For the past 12 years, claimant has been employed as a shop teacher and head track coach at Flint Hills High School. Claimant's 2002-2003 contract provides for a salary

[1] ALJ Award (Sept. 9, 2004) at 3.

of over $37,000 for 185 days of service commencing on August 21, 2002. The supplemental contract for his coaching activities for that same year provides another $3,000 with payments commencing on September 25, 2002.

During his tenure, claimant was generally aware of the practice of having teachers and/or coaches officiate the students' athletic games in addition to their contractual duties. In addition to his own paid service as a referee, claimant testified he was aware that several of his co-workers, Mark McNemee, Mark Womack and Eric Sorum, were paid to officiate at games.

In past years, claimant was paid to serve as a referee at the rate of $15 per game, and it had been the District's practice to pay him and the other referees at the end of the basketball season. According to claimant, he was advised by Mark Winn, the middle school principal and athletic director, that it was cheaper for the school district to pay its coaches or teachers rather than hiring officials from outside the district. During the 2002-2003 school year, claimant had officiated at 3 junior varsity games before December 3, 2002.

According to Mr. Winn, it was his obligation to recruit individuals to officiate at junior varsity basketball games. He explained that "[p]er night, I would hire four. Maximum four."[2] When asked to describe his process, he responded as follows:

> My normal procedure was to email all the people that normally would be open to that, that I thought would be wanting to help out. And after that - after a little while, if I did not get a response, I would go around individually to each teacher and/or coach depending on who had done it in the past and then I would ask if they had seen the e-mail, first of all, just to make sure they got it, and then at the time ask them if they were going to be available.[3]

Mr. Winn went on to testify that he was reluctant to ask claimant because he had in the past refused to serve as a referee. Mr. Winn indicated "I remember him refusing me because I was reluctant to go back to him thinking he wasn't going to want to do it, and he was kind of a last resort."[4]

Nonetheless, sometime before December 3, 2002, Mr. Winn approached claimant and asked him to referee at a middle school junior high basketball game that was to take place on December 3, 2002. Claimant consented to officiate and both parties agree

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[2] Winn Depo. at 9.

[3] *Id.* at 11-12.

[4] *Id.* at 13.

payment was not discussed although claimant assumed he would be paid as he had in years past.

During that game on December 3, 2002 claimant turned to run when he felt a pop in his knee. He was able to complete the game and advised Mr. Winn of the injury. An accident report was apparently made and a claim was filed.

From the outset of this claim respondent adamantly argued claimant was serving as a volunteer during the ball game and that there was no agreement to pay him for his services. Accordingly, respondent has consistently denied any responsibility for benefits. This refusal led to a preliminary hearing which was held on September 30, 2003.

In support of his claim, claimant testified at the preliminary hearing and offered the affidavits of Mark McNemee, Mark Womack and Eric Sorum, each of whom are claimant's co-workers. Their affidavits were marked as an exhibit and it is unclear whether the ALJ admitted them into evidence or merely accepted them based upon an understanding that each of these individuals' depositions would be taken. After being presented with the affidavits and hearing respondent's objection to them, on the basis of hearsay, the ALJ said the following:

> Okay. Set their depositions. Shouldn't take too long. Or do them all in one shot. Mr. Wonnell, [respondent's counsel] you can appear by phone if you wish. It is up to you gentlemen. You can schedule them here in front of me or one of your offices or at the school. It is up to you. But set it up as quickly as you can.[5]

The depositions suggested by the ALJ were not taken, either in connection with the preliminary hearing nor for purposes of the Regular Hearing. When asked at the Regular Hearing if he intended on including the preliminary hearing transcript, along with the exhibits, in the record to be considered in issuing his Award, the ALJ responded "[o]nly thing I will tell you is I'm not going to read the affidavits. If you want to take their testimony, go ahead and take it."[6]

The Board must first address the dispute surrounding the ALJ's inclusion of the preliminary hearing transcript within the formal record.

> It is well settled that "medical reports or any other records or statements" introduced at preliminary hearing may not be considered as evidence when the Administrative Law Judge determines the final award unless the parties either stipulate to their admission or the report, record, or statement is later supported by testimony of the person making it. *See* K.A.R. 51-3-5a. However, the Administrative Law is

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[5] P.H. Trans. at 5.

[6] R.H. Trans. at 28.

> empowered to determine whether the remainder of the evidence introduced at preliminary hearing should be considered for purposes of final award.[7]

In this instance, the ALJ informed the parties that he would be considering the preliminary hearing transcript and would not consider the affidavits for purposes of the final Award. The Board finds that as a general rule, preliminary hearing transcripts should be considered part of the record to be considered in the final Award. The evidence contained therein may or may not be relevant or it may be redundant by the time the Regular Hearing is held. But that transcript is, nonetheless, part of the record. The Board affirms the ALJ's decision to include and consider the transcript of the preliminary hearing.

The Board also affirms the ALJ's decision to exclude the affidavits attached to that transcript from his consideration. The admissibility of the affidavits was an issue within the ALJ's discretion. The Board finds no error in this instance and affirms the ALJ's decision to exclude the affidavits, absent a stipulation or an evidentiary deposition, because the ALJ made it clear to the parties in advance, that this would be his ruling. As a general rule affidavits should be admitted. Unlike the documents described in K.A.R. 51-3-5a, affidavits are sworn to. The fact that they are not subjected to cross examination goes to their weight, not their admissibility. Any party is free to depose an affiant should they so choose.

Turning now to the substantive issues, the Board notes that in workers compensation litigation the burden of proof is upon claimant to establish claimant's right to an award of compensation by proving various conditions upon which claimant's right depends by a preponderance of the credible evidence.[8] In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[9]

In this instance, even without considering the content of the affidavits offered at the preliminary hearing, the ALJ concluded the greater weight of the evidence indicates claimant's accidental injury arose out of and in the course of his employment with

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[7] *Ridder v. Topeka Truck Plaza, Inc.* No. 177,364, 1997 WL 569500 (Kan. WCAB July 30, 1997).

[8] *See* K.S.A. 44-501(a) (Furse 2000) and K.S.A. 2002 Supp. 44-508(g).

[9] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

respondent and that he was not acting as a volunteer at the time of his injury. The Board agrees with the ALJ's analysis.

While officiating at a middle school ball game might not have been within the express terms of his contract with respondent, it is clear that he was asked by the school principal, *his supervisor*, to perform the duties of a referee on December 3, 2002. The methodology Mr. Winn employed in order to *recruit* those he considered volunteers was designed to ensure he would receive an acceptable answer. When a non-confrontational e-mail did not achieve the desired result, he would make a personal visit to "ask them if they were going to be available."[10] It is clear that Mr. Winn wanted those he asked to help to submit to his request. And this would include claimant.

Moreover, claimant had been asked to do this on previous occasions and believed, as was the case before, that he would be paid for this service. Even Mr. Winn admits he did not discuss the issue of payment with claimant during this conversation. Thus, claimant had no reason to know that payment was not available for this duty even though he was paid in the past. Although Mr. Winn testified that he presently recruits "volunteers" to act as referees at the middle school junior varsity games, and that he did not expressly offer to pay claimant for his work at the December 3, 2002 game, the evidence is clear and uncontroverted that the policy of not paying teachers or coaches for their work as officials in middle school junior varsity games was new and implemented in the 2002-2003 school year, the same year Mr. Winn began to serve as the middle school athletic director. Before then, teachers and coaches were paid for their services. This is consistent with claimant's understanding.

The Workers Compensation Act, K.S.A. 44-501 et seq. is to be construed liberally to bring the parties within its provisions.[11] It is reasonable to hold this respondent responsible for claimant's injury when he was injured performing an act that was an incident of his employment. Accordingly, the Board finds that the ALJ's conclusion that claimant's accidental injury arose out of and in the course of his employment with respondent should be affirmed.

As for claimant's average weekly wage, the ALJ concluded claimant's compensation rate should be based upon his contractual salary rather than $15 per game. Respondent cites the Board's decision in *Buckridge*[12] as justification for limiting claimant's average weekly wage to the per game figure rather than utilizing the wages paid under claimant's

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[10] Winn Depo. at 12.

[11] *Nordstrom v. City of Topeka*, 228 Kan. 336, 613 P.2d 1371 (1980).

[12] *Buckridge v. U.S.D. 253*, No. 244,508, 2000 WL 623076 (Kan. WCAB Apr. 25, 2000).

teaching contract. Admittedly, *Buckridge* involved a teaching contract and the Board was required to determine what wages should be considered as part of the injured employee's wages. However, the case is distinguishable.

In *Buckridge*, the injured employee had completed her service under her contract with the school district, but had chosen to receive her contractual payments in 12 monthly installments. Nevertheless, because she had completed her service under the contract she was not permitted to use her wages earned under the contract for purposes of determining her average weekly wage for an injury she sustained while working at a summer job for that same district. *Buckridge* does not compel an average weekly wage computation utilizing only those activities for payment contemplated by a contract. Rather, *Buckridge* merely recognizes the convenience of payments spread out over a period of time and the fact that such a ministerial act does not alter the fundamental method of calculating an injured employee's average weekly wage.

Here, claimant's contract provided for a combined payment of wages of over $40,000 per year, a salary that the parties agree would qualify claimant for the maximum weekly benefit. The ALJ noted that "a school teacher and a coach wear many hats in the performance of their duty. Not all duties that a school teacher and a coach have can be specifically itemized."[13] The Board agrees with this general conclusion. In addition, under these facts it is clear that Mr. Winn specifically requested claimant, one of his subordinates, perform the job as referee. Although the contract between the two parties did not specifically encompass the duties of a referee at a junior varsity basketball game, the fact that claimant's supervisor asked him to return to the workplace and serve as a referee, a request that had been made in the past, *and a task that he had been paid for in past years*, justifies the ALJ's conclusion. The ALJ's finding that claimant's average weekly wage was sufficient for the statutory maximum is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated September 9, 2004, is affirmed in all respects.

[13] ALJ Award (Sept. 9, 2004) at 2.

IT IS SO ORDERED.

Dated this _____ day of March, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENTING OPINION

I disagree with the majority's statement that affidavits may be considered for purposes of final award without the declarant's supporting testimony. An affidavit is a statement and, therefore, it should not be considered for the final award without the parties stipulating to its admission or the declarant testifing. K.A.R. 51-3-5a provides:

> (a) Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement. If medical reports are not available or have not been produced before the preliminary hearing, either party shall be entitled to an ex parte order for production of the reports upon motion to the administrative law judge.

The majority's apparent conclusion that an affidavit is not a statement as contemplated by the regulation is erroneous.

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BOARD MEMBER

c: Todd King, Attorney for Claimant
Anton Andersen, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director